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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 390

WADE KITCHENS,

Petitioner,

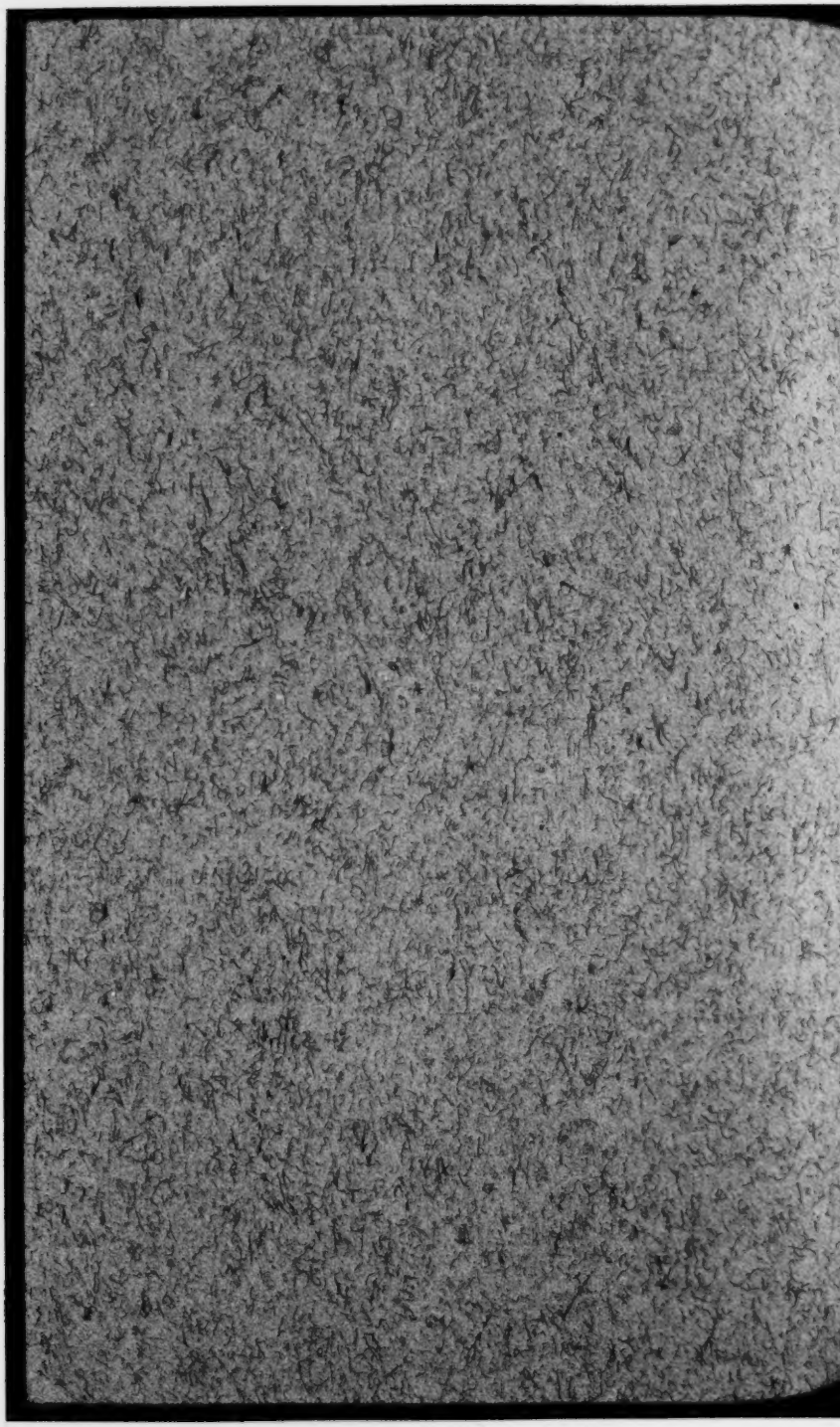
vs.

MRS. MARY BIRD, ET AL.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS AND BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

W. H. Kitchens, Jr.,
Wilson, Knipel and Norman,
U. A. Gantt,
J. R. Wilson,
Attorneys for Petitioner.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 390

WADE KITCHENS,

Petitioner,

vs.

MRS. MARY BIRD, ET AL.,

Respondents

PETITION FOR WRIT OF CERTIORARI

May It Please the Court:

The petition of Wade Kitchens respectfully shows to this Honorable Court:

A

Summary Statement of the Matter Involved

Petitioner herein brought this action in the Columbia Chancery Court, First Division, January 13, 1938. There was a judgment awarded by that Court on February 16, 1948, against the respondents, who were defendants in the Chancery Court (R. 144). The judgment of the court was for possession of certain lands belonging to the plaintiff (petitioner here) after and subject to an accounting

to be had between the parties with regard to amounts plaintiff and J. B. Wilson (the ancestor of respondents) owed to each other arising out of certain joint adventures for profit which they had undertaken. The respondents here appealed the case to the Supreme Court of Arkansas where the judgment of the lower court was reversed (R. 155). Petitioner filed in the Supreme Court his petition for rehearing (R. 163) in which he raised certain constitutional objections to the findings and judgment of the Supreme Court of Arkansas. Petitioner believes that certain important Federal questions have been raised, and that he is now entitled to have these questions reviewed.

The action in the state courts arose out of the following facts, none of which are *seriously* controverted:

About 1915 Wade Kitchens, then a practicing attorney in Magnolia, Columbia County, Arkansas, and J. B. Wilson, a Magnolia businessman, began pooling their respective efforts and resources in a series of joint adventures or limited partnerships, each transaction separate unto itself. Wilson maintained businesses of his own in which Kitchens was not concerned, and Kitchens maintained his law practice in which Wilson was not concerned, but about 1915 they purchased a retail mercantile establishment and operated it as a partnership for a number of years (R. 117). During this same period of time they expanded their efforts into other fields, sometimes buying lands jointly, some for resale and some for investment. They also began to borrow money and loan it out to persons on various types of security. Another of their many joint activities consisted of endorsement by the two men of various notes made by other persons as principals, thus extending to the principal a sort of surety service for which they obtained profit (R. 112).

During the twenties they borrowed considerable sums of money from various sources, two of the sources being

R. S. Warnock, a businessman in Magnolia, and T. P. Lester another man of some means in that community. These loans were, for the most part, made on open notes signed by both Wilson and Kitchens as joint obligors. The Warnock note, which served as a basis for the judgment and execution sale out of which this law suit grew, was signed by both Wilson and Kitchens as joint obligors and was used in their joint adventures (R. 112).

At the onset of the depression in 1930 the two men ceased to take on any new business and confined their activities to the management of their properties, collection of rent thereon, and efforts to pay off the indebtedness for which they had obligated themselves during their more prosperous years. It is uncontroverted that the last of these joint debts was paid off by Kitchens in 1943, some 5 years after the filing of this suit on January 13, 1938.

On March 17, 1930, J. B. Wilson and Wade Kitchens gave a joint note to T. P. Lester in the principal amount of $5000.00 to bear interest at 8%. On November 23, 1930, J. B. Wilson and Wade Kitchens executed their joint note to R. S. Warnock in the principal amount of $10,000.00 to bear interest at 8%. The testimony is undisputed that the proceeds of the Warnock note, which was a renewal note covering a past due indebtedness, were used in the joint adventures undertaken by these two men (R. 112).

On February 14, 1933, Wilson and Kitchens executed a mortgage to T. P. Lester to secure the $5,000.00 which they had borrowed from him in 1930. On the same day, February 14, 1933, Warnock obtained a default judgment against Wilson and Kitchens in the Circuit Court of Columbia County in the principal sum of $9945.60, to bear interest from the date taken until paid at 8% per annum.

For a period of some 3 years after the taking of the judgment no action was taken against Wilson and Kitchens and matters remained in a rather static condition.

In 1936 R. S. Warnock, Jr., Warnock's Administrator (Warnock having died) found out that on September 16, 1935, and again on March 9, 1936, Wilson had sold timber from lands included in the Lester mortgage and other lands belonging to Wilson and Kitchens. Wilson had apparently pocketed the money, and Warnock believed that Wilson was able to pay off the judgment obtained by Warnock out of the sale of timber. The sale of timber was made without the knowledge or consent of Wade Kitchens.

Warnock, having learned of this action of bad faith on the part of Wilson, determined to pray for execution on the judgment which he had obtained more than 3 years before, and a Writ of Execution was issued April 15, 1936, ordering the Sheriff to levy upon and sell the lands of Wilson and Kitchens to pay the joint and several judgment rendered against them and in favor of Warnock on February 14, 1933.

On the day set for sale this first execution was returned at the request of Warnock and the defendant Wilson, it being the testimony of Warnock's attorney that one of the reasons why the first sale was not had was because Warnock and Wilson were then negotiating for a settlement of the indebtedness (R. 134).

On June 2, 1936, a second execution was issued, and the lands of Wilson and Kitchens were again advertised for sale. This sale was scheduled to take place on July 24, 1936, between the hours of 9 o'clock in the forenoon and 3 o'clock in the afternoon (the hours being those prescribed by Arkansas law—Ark. Statute 1947—30-419).[1]

In the meantime Lester, having learned of the bad faith of Wilson in selling timber from lands under mortgage to

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[1] 30-419—Time and mode of sale.—All property taken in execution by any officer, shall be exposed to sale on the day for which it was advertised, between the hours of nine o'clock in the forenoon and three o'clock in the afternoon, publicly, by auction, for ready money, and the highest bidder shall be the purchaser.

Lester, filed suit on June 16, 1936, for foreclosure of his mortgage.

On the day set for the sale under the execution (July 24, 1936), Wilson made arrangements with Warnock for the satisfaction of the indebtedness upon which the Warnock judgment was based. The arrangements made included the payment by Wilson of $2500.00 on the indebtedness and Wilson's agreement to pay the balance within 15 days; the entire amount demanded to satisfy the judgment being $9500.00, a saving of nearly $2500.00 in interest due on the judgment. (This settlement of the indebtedness by one of the joint obligors and joint judgment debtors *before the sale,* is the basis of petitioner's contention that the settlement constituted a satisfaction of the judgment by one of the joint obligors, and extinguished the judgment upon which the Execution Sale was had.) This agreement was evidenced in writing and may be found in the printed record at page 40 thereof. Wilson by a pleading in another suit (R. 98) alleged that he had paid off the judgment.

Under the agreement, Wilson took charge of the sale, grouped the lands in 4 large blocks, one of which contained some 3500 acres (R. 23); each of the 4 blocks included some lands belonging only to Kitchens, some lands belonging to both Wilson and Kitchens, and some lands belonging to neither Wilson nor Kitchens; and one 80-acre tract belonging only to Wilson. (Under the agreement between Wilson and Warnock the lands of Wilson were not to be sold.) Each of the blocks of land included some farm lands, some timber lands, and some city property. Mortgaged lands were included with lands clear of all mortgage.

This grouping took place only a few minutes before the sale (R. 131). The offerings were made in the blocks as set out above, and anyone bidding on the property was forced to bid on the entire block (R. 53). Under these circumstances, it was obviously impossible that a fair sale

could be had, for no prospective purchaser *could have known* what property he was bidding on.

The evidence is undisputed that several persons were present on the morning of the sale with the announced intention to purchase certain tracts of the land (R. 49). At the request of Wilson the sale was postponed until shortly before 3 o'clock and it is not seriously disputed that only one of the four sales took place within the hours prescribed by law and as shown in the advertisement. The other three sales occurred between 3 o'clock and 4 o'clock in the afternoon (R. 53). The rumor was circulated shortly before the sale started that the property was not to be sold on this day and some of the prospective purchasers had left (R. 49).

Wilson, through his "dummy" bidder, Alvin Rogers, (R. 101) "bought" the lands at the execution sale for the total sum of $4750.00, acquiring for this amount over 4000 acres of farm and timber lands, several brick store buildings, residences and other city property.

The so-called "purchaser" at the sale, Alvin Rogers, testified that he had no interest in the sale, that he paid no money and that he obtained no papers showing any prospective ownership by him (R. 101 to R. 105). Wilson paid nothing at the sale, for he had already satisfied the judgment. The Sheriff testified that he collected no money because he understood that Warnock had already gotten his money (R. 130).

Thus, we have a sale at which the "purchaser" paid no money; a sale at which the person who actually obtained the property had, himself, grouped the lands as he wished to have them sold and had then had his "dummy" bidder bid the property in. Wilson determined the time of holding the sale (R. 52), had his own attorney read the descriptions of the property as it was offered for sale (R. 53); and, in fact, as was found by the lower court and not refuted

by the Supreme Court, completely dominated the sale, the circumstances of which were described by the lower court as "most unusual if not extraordinary" (R. 137).

After the so-called sale was had, one of Wilson's attorneys undertook to prepare the Certificates of Purchase as required by law. Arkansas law (Arkansas Statutes—1947, Section 30-439) [2] requires that copies of these certificates of purchase be filed with the Clerk of the Court together with the return of the execution, the purpose being to provide the Clerk, as well as other interested parties, with the information necessary to determine the amount required for redemption of the property should any person entitled under the law to redeem desire to do so.

For more than a year after the sale Kitchens and his agents inquired regularly at the Clerk's office regarding the return of the execution and copies of the Certificates of Purchase (R. 85). The Certificates of Purchase and return of execution were withheld from the files in the Clerk's office *by Wilson and his counsel* until well after the time of the bringing of this suit (R. 138), if, indeed, they were *ever* filed, and Kitchens was thereby prevented by the purchaser's attorney, from redeeming his property as he had a right to do under the laws of Arkansas. (Ark. Stat. 1947—Sec. 30-441).[3]

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[2] Sec. 30-439—Certificate of sale given purchaser by sheriff—Return of duplicate.—The sheriff shall give the purchaser of any real property, sold upon execution, a certificate of sale, in which the property sold shall be described, and the price for which it is sold stated. Such certificate shall be evidence of the purchase at the price stated, and the officer shall return a duplicate thereof with the execution. No conveyance shall be made to the purchaser, nor the possession delivered to him, until the time for redeeming has expired; and, if said property is redeemed by the defendant, as provided in this chapter the sale and certificate of purchase shall be null and void.

[3] Sec. 30-441—Manner of making redemption.—The debtor may, at any time within twelve (12) months, pay to the clerk of the court, where the execution issued, the purchase money with fifteen (15) per cent, per annum, and all lawful charges, and take his receipt therefor; such money

Wilson's attorney testified (R. 125 to R. 127) that he read off the descriptions of land that were contained in the Notice of Sale and the Sheriff testified (R. 131) that he tried to follow the notice of sale in selling the property; yet, there appear in the Sheriff's deeds at least 4 tracts of land which were not included in the Notice of Sale and which, therefore, by the testimony of defendant's own witnesses, were not actually sold at the sale. The Supreme Court has ordered that these lands, which were not sold, be taken from this petitioner and turned over to the respondents as a result of the alleged sale.

Many of the tracts of land were not levied upon as required by Arkansas law. Arkansas law (Ark. Stat. 1947, Sect. 30-417)[4] requires that the Sheriff place upon the lands to be sold Notices of Sale, and the placing of such Notices of Sale constitutes the only levy on such lands required for execution. Petitioner testified, and his testimony was not refuted, that many of the tracts of land sold *to his own knowledge* had no such notices placed upon them (R. 120 and 121). These tracts of land could not have been properly sold for they were not levied upon.

These facts were all found to be true by the trial court and formed the basis of the trial court's determination of

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shall be held by the clerk for the use of the purchaser, and he shall be responsible upon his official bond therefor. Such clerk shall indorse upon the execution-book that such redemption has been made.

[4] 30-417—Notice of sale of real and personal property—Advertisement.—The time and place of sale of real property upon execution, or by virtue of a judgment, or order of sale, must be advertised for at least twenty (20) days, next before the day of sale, by posting printed advertisements at the courthouse door and five (5) other public places in the county in which the sale is to be made, one of which is to be upon the premises to be sold, and by publishing the same for at least two (2) insertions, before the day of sale, in a weekly newspaper published in the county, if one there be. The time and place of sale of personal property shall be advertised by posting written or printed notices at three (3) of the most public places in the vicinity of the place of sale.

the case. The findings of these facts were not reversed by the Supreme Court. The only finding of fact reversed by the Supreme Court was the finding of the trial court that there was a partnership.

The trial court *and the Supreme Court* also made a finding of fact as to the payment by Kitchens of $8303.13 in payment of the Lester foreclosure judgment. This was also a joint indebtedness and its principal significance here is to show that Kitchens was doing everything in his power to pay off the debts and save his *and Wilson's* property.

Under these circumstances and upon this proof, the trial court found in favor of plaintiff, declared the sale void and ordered an accounting between the parties as to their entire business relationship, there being evidence that Wilson, before the sale, had sold timber from lands belonging to Kitchens and had not accounted for the money thus obtained.

The Supreme Court of Arkansas reversed the judgment of the lower court on the grounds that there was no partnership and thus no fiduciary obligation, and that, although there had been joint adventures, these joint adventures did not carry with them any fiduciary obligation, and that there was no evidence of fraud.

Although we are convinced that the Supreme Court was wrong as to the evidence of fraud, this conclusion of law need not be considered here, it being the intention of counsel for petitioner to present only points raising constitutional issues.

B

Reasons Relied upon for Allowance of the Writ

1. The judgment and decision of the Supreme Court of Arkansas in directing that title be quieted in respondents to lands of petitioner which were not actually sold at the Execution Sale and which were not included in the advertisement of sale, and some of which were not even included

in the certificates of purchase, being only included in the Sheriff's deeds growing out of these proceedings, took from petitioner his property without due process of law in violation of Amendment 14, Section 1 of the Constitution of the United States.

2. The judgment and decision of the Supreme Court of Arkansas in cutting off petitioner's equity of redemption and his statutory right to redeem before that right to redeem had materialized took from petitioner his property without due process of law and operated to deny him the equal protection of the laws of Arkansas which grant to a judgment debtor one year within which to redeem his property sold at Execution Sale; both in violation of Amendment 14, Section 1 of the Constitution of the United States.

3. The judgment and decision of the Supreme Court of Arkansas in holding valid an Execution Sale and the Sheriff's deeds executed as a result thereof when there was no judgment in effect at the time of the sale upon which to base an Execution Sale (the judgment having been satisfied by compromise and settlement made by one of the joint obligors before the sale took place) took from petitioner his property without due process of law in violation of Amendment 14, Section 1 of the Constitution of the United States.

4. The Statute of Arkansas under which this Execution Sale was had (as digested in Sections 30-401 to 30-439 of the Arkansas Statutes of 1947) is void as a violation of Amendment 14, Section 1 of the Constitution of the United States, inasmuch as it does not provide for proper notice and levy upon property to be sold as a prerequisite to the validity of such sale.

5. The judgment and decision of the Supreme Court of Arkansas violates Amendment 14, Section 1 of the Constitu-

tion of the United States in that it takes from petitioner his lands and gives them to respondents because of a purported Execution Sale at which the alleged purchaser paid no consideration and gave absolutely no money, and at which the debtor obtained no benefit.

6. The judgment and decision of the Supreme Court of Arkansas in approving a sale in which none of the normal and prescribed procedure was followed, took from petitioner his property without due process of law, in violation of Amendment 14, Section 1 of the Constitution of the United States.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Supreme Court of Arkansas, commanding that Court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 8839, Series 4, Mrs. Mary Bird, et al., Appellants, *vs.* Wade Kitchens, Appellee, and that the said judgment of the Supreme Court of Arkansas may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

WADE KITCHENS,
By HAMPTON KITCHENS,
WILSON, KIMPEL and NOBLES,
U. A. GENTRY,
Attorneys for Petitioner,
By J. R. WILSON.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 390

WADE KITCHENS,

Petitioner,

vs.

MRS. MARY BIRD ET AL.,

Respondents

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

The Opinion of the Court Below

The opinion of the Supreme Court of Arkansas has not been officially reported at this time. The opinion was dated May 16, 1949, and appears in Vol. 90 No. 5 of the Law Reporter (R. 155 et seq.).

II

Jurisdiction

1

Petition for rehearing was denied by the Supreme Court of Arkansas June 27, 1949 (R. 163).

2

That the questions raised on Petition for Certiorari are Federal in nature, if substantial, is beyond dispute, for the allegations reflect petitioners rights under the Federal Constitution. Jurisdiction of this Court is, therefore, invoked under the authority of Section 237 subparagraph B of the Judicial Code as amended on the ground that there was especially set up and claimed by petitioner a right, title, and privilege under the Constitution of the United States as set forth in the Fourteenth Amendment, Section 1.

3

The very important question as to the substance of the Federal questions herein involved will be discussed in connection with each of the points raised. Assuming that the Federal questions are substantial, it then becomes important to determine whether they were properly raised, for, *if they were timely,* then they give this court jurisdiction of this case, and the Petition for Writ of Certiorari must be granted.

These questions, *i. e.,* the question of timeliness and the question as to whether a Federal question exists, are in themselves Federal questions. In *Lovell* v. *Griffin,* 82 L. ed., 949 (Headnote 2); 303 U. S. 444; 58 S. Ct. 666, we find the following:

> "Whether a Federal question was adequately presented and decided in a state court is itself a Federal question."

And in *First National Bank of Guthrie Center* v. *Anderson,* 70 L. Ed. 295 (Headnote 1); 269 U. S. 341; 46 S. Ct. 135, it was held:

> "Whether a pleading sets up a sufficient right of action or defense grounded on the Constitution or law

of the United States *is necessarily a question of Federal law,* and where a case from a state court presents that question the Supreme Court of the United States *must determine for itself the sufficiency of the allegations displaying the right or defense,* and is not concluded by the view of them taken by the state court." (Italics ours.)

Again in *Schuylkill Trust Company* v. *Pennsylvania,* 80 L. ed., 91 (Headnote 4); 296 U. S. 113, 56 S. Ct. 31, this court, in determining whether the question presented was raised in the State Court, held:

> "Whether the point that a state tax discriminated against shares of a national bank was raised in the state court is, on appeal to the Supreme Court of the United States, a Federal question, to determine which the court will examine the record."

And in the same case with regard to the lower court's failure to discuss the Federal question, we find:

> "Where a question was presented to the trial court and included in the party's requests for conclusions of law by that court, such question is before the Supreme Court for decision, notwithstanding the failure of the trial court to discuss the question in its opinion."

4

That the Supreme Court of a state may be the offender, as well as the Legislature or other state authorities, is obvious on consideration of *Home Telephone & Telegraph Co.* v. *Los Angeles,* 57 L. ed., 510 (Headnotes 2 and 3); 227 U. S. 278; 33 S. Ct. 312, where it was held:

> "The prohibitions and guaranties of U. S. Const., 14th Amend., are addressed to, and control, not only the states, *but also every person, whether natural or juridical, who is the repository of state power.* (For

other cases, see Constitutional Law, 76, 92, 175-180, 426, 427, in Digest Sup. Ct. 1908). (Italics ours.)

"A case where one in possession of state power uses that power to the doing of wrongs which are forbidden by U. S. Const., 14th Amend., is within the purview of that Amendment, even though the consummation of the wrong may not be within the powers possessed, if the commission of the wrong itself is rendered possible or is efficiently aided by the state authority lodged in the wrongdoer. (For other cases see Constitutional Law 76, 92, 175-180, 426, 427, in Digest Sup. Ct. 1908)."

Also in *Iowa-Des Moines Nat. Bank* v. *Bennett,* 76 L. ed., 265, 266 (Headnote 3); 284 U. S. 239; 52 S. Ct. 133, the Supreme Court held:

"Although the prohibition of the 14th Amendment has reference exclusively to action by the state as distinguished from action by private individuals, the rights thereby protected may be invaded by the acts of a state officer under color of state authority, even though he not only exceeded his authority, but also disregarded special commands of the state law."

And in *Scott* v. *McNeal,* 38 L. ed., 896, 901; 154 U. S. 34; 14 S. Ct. 1108, the court stated:

"The grounds of the judgment of the supreme court of the state of Washington in the case at bar, as stated in its opinion, were that the equities of the case appeared to be with the defendants; that the court was inclined to follow the case of Roderigas *v.* East River Sav. Inst., 63 N. Y. 460, 20 Am. Rep. 555, and that, under the laws of the territory, the probate court, on an application for letters of administration, had authority to find the fact as to the death of the intestate; the court saying: 'Our statutes only authorize administration of the estate of deceased persons, and before granting letters of administration the court must be satisfied by proof of the death of the intestate. The

proceeding is substantially in rem, and all parties must be held to have received notice of the institution and pendency of such proceedings, where notice is given as required by law, Section 1299 and 1881 Code gave the probate court exclusive original jurisdiction in such matters, and authorized such court to summon parties and witnesses, and examine them touching any matter in controversy before said court or in the exercise of its jurisdiction.' Such were the grounds upon which it was held that the plaintiff had not been deprived of his property without due process of law. 5 Wash. 309, 317, 318. • • •

"The 14th Article of Amendment of the Constitution of the United States, after other provisions which do not touch this case, ordains 'nor shall any state deprive any person of life, liberty or property without due process of law, nor deny any person within its jurisdiction the equal protection of the laws.' *These prohibitions extend to all acts of the state, whether through its legislative, its executive or its judicial authorities.* Ex parte Virginia ('Virginia *v.* Rives') 100 U. S. 313, 318, 319 (25: 667, 669); Ex parte Virginia 100 U. S. 339, 346 (25: 676, 679); Neal *v.* Delaware, 103 U. S. 370, 397 (26: 567, 574). And the first one, as said by Chief Justice Waite in United States *v.* Cruikshank, 92 U. S. 542, 554 (23: 588, 592), repeating the words of Mr. Justice Johnson in Bank of Columbia *v.* Okely, 17 U. S. 4 Wheat. 235, 244 (4: 559, 561); *was intended 'to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.'*" (Italics ours.)

"No judgment of a court is due process of law, if rendered without jurisdiction in the court, *or without notice to the party.*" (Italics ours).

5

Nor can it be said that this petition was not timely, for, in the case at bar, *the Supreme Court of Arkansas itself being the offender,* the Federal questions were raised at

the first opportunity, *i.e.*, on petition for rehearing in this case. (It will be remembered that the lower court held for petitioner.)

The timeliness as to the raising of each of the points will be more fully discussed in the discussion of each point; however, it will be proper here, we believe, to call the court's attention to *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 74 L. Ed., 1107, 1111; 281 U. S. 673; 50 S. Ct. 451. In that case the Federal questions were raised for the first time on petition for rehearing, *and the petition was denied without an opinion.* The Supreme Court of the United States held that the claim of Federal right was timely because it was raised at the first opportunity. We quote from this opinion:

> "A Federal question raised for the first time on petition for rehearing in the highest court of the state is raised in time, where it is presented by a construction placed upon a statute by such court in its decision, *at variance with a construction formerly adopted by it.* • • •
>
> "The plaintiff seasonably filed a petition for a rehearing in which it recited the above facts and asserted, in addition to its claims on the merits, that, in applying the new construction of article 4 of chapter 119 to the case at bar, and in refusing relief because of the newly found powers of the commission, the court transgressed the due process clause of the 14th Amendment. *The additional federal claim thus made was timely, since it was raised at the first opportunity.* Missouri ex rel. Missouri Ins. Co. *v.* Gehner, 281 U. S. 313, ante, 870, 50 Sup. Ct. Rep. 326. *The petition was denied without opinion. This court granted certiorari.* 280 U. S. 550, ante, 608, 50 Sup. Ct. Rep. 152. We are of the opinion that the judgment of the supreme court of Missouri must be reversed, because it has denied to the plaintiff due process of law—*using that term in its primary sense of an opportunity to be*

heard and to defend its substantive right." (Italics ours).

Again in *Radio Station WOW, Inc.* v. *Johnson,* 89 L. Ed., 2092, 2100; 326 U. S. 120; 65 S. Ct. 1475, this court in considering the timeliness of Federal questions stated:

> "Questions first presented to the highest State court on a petition for rehearing come too late for consideration here, *unless the State court exerted its jurisdiction in such a way that the case could have been brought here had the questions been raised prior to the original disposition.* Simmerman *v.* Nebraska, 116 U. S. 54, 29 L. Ed. 535, 6 S. Ct. 333; Godchaux Co. *v.* Estopinal, 251 U. S. 179, 64 L. Ed. 213, 40 S. Ct. 116; American Surety Co. *v.* Baldwin, 287 U. S. 156, 77 L. Ed. 231, 53 S. Ct. 98, 86 ALR 298." (Italics ours).

And in *State of Missouri* v. *Gehner,* 74 L. Ed., 870 (Headnote 2) 281 U. S. 313; 50 S.Ct. 326, it was held:

> "Although the Supreme Court of the United States ordinarily will not consider contentions first made in a petition to the state court for rehearing, where the petition is denied without more, the question whether a state tax law is violative of Federal constitutional and statutory provisions precluding state taxation of Federal securities is properly presented in the state court, so as to be entitled to consideration by the Supreme Court of the United States, although it is first raised in a petition for rehearing after a decision of the state court so construing the statute as to give it that effect, *where such construction was not reasonably to be anticipated.*" (Italics ours).

6

Let us now consider the extent of review by the Supreme Court of the United States in determining its jurisdiction on appeal from a state supreme court's opinion. In *Aetna*

Life Insurance Co. v. *Dunken* 69 L. Ed., 342; 266 U. S. 389; 45 S. Ct. 129, it was held:

> "The Supreme Court of the United States may review a decision of a state court upon a question of fact if a Federal right has been denied *as a result of a finding shown by the record to be without evidence to support it,* or where a conclusion of law as to a Federal right and findings of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts." (Italics ours).

And in *Patterson* v. *Alabama,* 79 L. Ed., 1082; 294 U. S. 600; 55 S. Ct. 575, the court's determination was as follows:

> "In the exercise of its appellate jurisdiction, the Supreme Court has power not only to correct error in the judgment under review, *but to make such disposition of the case as justice requires.* • • •"

And in the same case the court's determination was as follows:

> "The Supreme Court may, in recognizing a chance in fact or law since the entry of judgment which affects the just disposition of the case, set aside the judgment and remand the case so that the state court may be free to act, although such change affects a non-Federal question."

In *Villa* v. *Van Schaick,* 81 L. Ed., 91, 93; 299 U. S. 152; 57 S. Ct. 128, the court announced the recognized doctrine that it will, upon assuming jurisdiction, make such disposition of the case as justice requires. We quote from this opinion:

> "We have frequently said that in the exercise of our appellate jurisdiction *we have power not only to correct errors in the judgment under review but to make such disposition of the case as justice requires.*

In determining what justice does require we have considered changes, either in fact or law, supervening since the judgment was entered and in such cases we have set aside the judgment and remanded the cause so that the state court might be free to act. *We think that the fundamental principle involved in such action applies as well to cases where the record before us does not adequately show the facts underlying the decision of the state court of the federal question* and opportunity should be given for their appropriate presentation either through amendment of the record or by further proof as the state court may be advised. See Gulf, C. &. S. F. R. Co. *v.* Dennis, 224 U. S. 503, 506-509, 56 L. Ed. 860-862, 32 S. Ct. 342; Watts, W. & Co. *v.* Unione Austriaca di Navigazione, 248 U. S. 9, 21, 63 L. Ed. 100, 101, 39 S. Ct. 1, 3 A.L.R. 323; Dorchy *v.* Kansas, 264 U. S. 286, 289, 68 L. Ed., 686, 689, 44 S. Ct. 323; Missouri ex rel. Wabash R. Co. *v.* Public Serv. Commission, 273 U. S. 126, 131, 71 L. Ed., 575, 577, 47 S. Ct. 311; Patterson *v.* Alabama, 294 U. S. 600, 607, 79 L. Ed. 1082, 1085, 55 S. Ct. 575. To afford this opportunity we vacate the judgment and remand the cause for further proceedings." (Italics ours).

In *Great Northern Railway Co.* v. *Washington*, 81 L. Ed., 573, 574; 300 U. S. 154; 57 S. Ct. 397, the court again announced its right to review the findings of fact made by the lower court:

> "When an asserted Federal right has been denied by a state court, the Supreme Court of the United States is not concluded by a finding of fact or a mixed finding of law and fact made by the state court, *but will examine the evidence to ascertain whether it supports the decision against the claim of Federal right.*" (Italics ours).

This doctrine was again announced in *Pierre* v. *Louisiana*, 83 L. Ed. 757, 306 U. S. 354; 59 S. Ct. 536, as follows:

> "Where a question of deprivation of constitutional right by action of state officers involves the conclusions reached by the state court whose decision is being reviewed, upon the questions of fact involved, such conclusions, while entitled to great respect, are not controlling, and it is the duty of the Supreme Court to make independent inquiry and determination of the disputed facts."

In *McCollough* v. *Commonwealth of Virginia*, 43 L. Ed. 382; 172 U. S. 102; 19 S. Ct. 134, this court held:

> "In reviewing the judgment of the courts of a state, this court is not limited to a mere consideration of the language used in the opinion, *but may examine and determine what is the real substance and effect of the decision.*" (Italics ours).

In *West Ohio Gas Co.* v. *Public Utilities Comm. of Ohio* 79 L. Ed. 773, 294 U. S. 79; 55 S. Ct. 324, this court held that an arbitrary determination of a utility rate constituted the taking of property without due process of law regardless of the fact that an opportunity for hearing was had, apparently basing its conclusion on the doctrine previously announced that:

> "the mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law, *if the necessary result be to deprive him of his property without compensation.*" (Washington ex rel. Oregon R. & N. Co. *v.* Fairchild, 56 L. Ed. 863, 868; 224 U. S. 510; 32 S. Ct. 535). (Italics ours).

This doctrine is equally applicable in the case at bar where, although the form of a hearing may be said to have been had, ***the determination was so arbitrary and unreasonable that it cannot be held to have constituted due process.***

The extent to which this court must necessarily go in preserving justice under our system of jurisprudence may be seen by consideration of the recent case of *Shelley* v. *Kraemer,* 92 L. Ed., 1161, 1162; 334 U. S. 1; 68 S. Ct. 836. We cite from this case:

> "While restrictive covenants as to ownership or occupancy of property, based on race or color, cannot in themselves be regarded as a violation of the equal protection clause of the Fourteenth Amendment, judicial enforcement by state courts of such covenants is inhibited by the equal protection clause of such Amendment, even though such courts stand ready to enforce restrictive covenants irrespective of the race of which exclusion is sought (distinguishing Corrigan *v.* Buckley, 271 U. S. 323, 71 L. Ed. 969, 46 S. Ct. 621 and Hansberry *v.* Lee, 311 U. S. 32, 85 L. Ed. 22, 132 A.L.R. 741, 61 S. Ct. 115). • • •
>
> "*The action of state courts and of judicial officers in their official capacities,* even though taken for the enforcement of private agreements, *is state action within the provision of the Fourteenth Amendment that no state shall deny to any person within its jurisdiction the equal protection of the laws.* • • •
>
> "The power of the states to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment."

Points raised on this petition for certiorari were raised in a substantial form on petition for rehearing. They were not raised prior to that time because the Federal questions did not arise until the decision of the Supreme Court of Arkansas operated, *within itself,* to take from this petitioner his property without due process of law.

III

Statement of the Case

NOTE: A full statement of the case has been given under heading "A" in the Petition for Writ of Certiorari herein, and in the interest of brevity, the statement will not be repeated under this point.

IV

Specification of Errors

1. The judgment and decision of the Supreme Court of Arkansas in directing that title be quieted in respondents to lands of petitioner which were not actually sold at the Execution Sale and which were not included in the advertisement of sale, and some of which were not even included in the certificates of purchase, being only included in the Sheriff's deeds growing out of these proceedings, took from petitioner his property without due process of law in violation of Amendment 14, Section 1 of the Constitution of the United States.

2. The judgment and decision of the Supreme Court of Arkansas in cutting off petitioner's equity of redemption and his statutory right to redeem before that right to redeem had materialized took from petitioner his property without due process of law and operated to deny him the equal protection of the laws of Arkansas which grant to a judgment debtor one year within which to redeem his property sold at Execution Sale; both in violation of Amendment 14, Section 1 of the Constitution of the United States.

3. The judgment and decision of the Supreme Court of Arkansas in holding valid an Execution Sale and the Sheriff's deeds executed as a result thereof when there was

no judgment in effect at the time of the sale upon which to base an Execution Sale (the judgment having been satisfied by compromise and settlement made by one of the joint obligors before the sale took place) took from petitioner his property without due process of law in violation of Amendment 14, Section 1 of the Constitution of the United States.

4. The Statute of Arkansas under which this Execution Sale was had (as digested in Sections 30-401 to 30-439 of the Arkansas Statutes of 1947) is void as a violation of Amendment 14, Section 1 of the Constitution of the United States, inasmuch as it does not provide for proper notice and levy upon property to be sold as a prerequisite to the validity of such sale.

5. The judgment and decision of the Supreme Court of Arkansas violates Amendment 14, Section 1 of the Constitution of the United States in that it takes from petitioner his lands and gives them to respondents because of a purported Execution Sale at which the alleged purchaser paid no consideration and gave absolutely no money, and at which the debtor obtained no benefit.

6. The judgment and decision of the Supreme Court of Arkansas in approving a sale in which none of the normal and prescribed procedure was followed took from petitioner his property without due process of law, in violation of Amendment 14, Section 1 of the Constitution of the United States.

V

ARGUMENT

Summary of Argument

Point A: The Supreme Court of Arkansas took from petitioner his property without due process of law when it

ordered the lower court to quiet in respondents title to petitioner's property, the only claim to which they had were bare sheriff's deeds purporting to convey property which had not been sold at Execution Sale; said sheriff's deeds constituting mere clouds upon the title of petitioner.

Point B: The Supreme Court of Arkansas denied this petitioner the equal protection of the laws of Arkansas and took from petitioner his property without due process of law when it announced that petitioner's equity of redemption had expired before it actually began; petitioner being unable to effect a redemption until the Clerk had official information concerning the sale upon which to compute the amount necessary for petitioner's redemption of his property.

Point C: The Supreme Court of Arkansas took from petitioner his property without due process of law when it ordered the title to be quieted in respondents to lands belonging to petitioner which were sold at a purported Execution Sale upon which no judgment existed as a basis for the said execution; the Sheriff's deeds executed as a result of said sale constituting mere clouds upon the title of this petitioner to his property.

Point D: The statute of Arkansas under which this purported Execution Sale was had is void as construed by the Supreme Court of Arkansas because that court has construed it to provide for transfer of a judgment debtor's property at an Execution Sale without the necessary prerequisites of notice and levy; the previous construction placed on this statute by the Supreme Court of Arkansas having been that notice and levy *were* essential to a valid sale.

Point E: The Supreme Court of Arkansas took from petitioner his property without due process of law in violation of Amendment 14, Section 1 of the Constitution of the United States, when it ordered the lower court to quiet in respondents title to petitioner's property because of Sheriff's deeds growing out of a purported Execution Sale at which the alleged purchaser paid nothing and acquired nothing, and at which petitioner received no benefit because of the sale; said purported sale being a mere form insufficient in itself to convey title, and the Sheriff's deeds executed in connection therewith constituting mere clouds upon the title of petitioner.

Point F: The circumstances surrounding the purported Execution Sale were so irregular that they did not constitute due process of law, following merely the form of due process without any opportunity for petitioner to obtain justice thereunder.

Point A

The Order by the Supreme Court of Arkansas to Quiet in Respondents Title to Property Not Actually Sold at the Execution Sale.

This point was raised as Point 1 of petitioner's petition for rehearing in the Supreme Court of Arkansas.

The point was raised at the first possible opportunity inasmuch as the taking of the property without due process was perpetrated by the decision of the Supreme Court of Arkansas itself. The Sheriff's deeds standing alone and without the benefit of a valid sale, were and must have been void, and, as such, constituted mere clouds upon the title of this petitioner. They were insufficient, of themselves, to convey title or to constitute a taking of property without due process.

In 21 Am. Jur. Page 131, Section 261, it is stated:

> "Title to realty is not transferred to an execution purchaser by a deed where one parcel of land is sold and another attempted to be conveyed. *The extent and operation of the deed must be measured by the levy and sale* and cannot be enlarged by any expression that may have been made use of therein. Parol evidence is therefore admissible to show that *the sheriff excepted from the sale certain lands included in the deed.* Similarly, an execution sale of personal property may be attacked by showing that the particular property mentioned in the certificate of sale actually was not included in the execution sale." (Italics ours.)

For this reason the action of *the Sheriff* did not take petitioner's property without due process of law. Before there could be a taking there must have been a passing of the title, and the Sheriff's deeds were insufficient to do this. Petitioner recognized this when, in his complaint and amendment thereto (R. 11 and R. 40), prayed that these deeds be removed *as a cloud from his title.* The taking occurred in the Supreme Court of Arkansas when that court ordered the lower court to divest petitioner of title to this property and to invest title thereof in respondents.

That this taking was in violation of the due process clause of the Constitution cannot be denied. In *Ochoa* v. *Hernandez Y. Morales,* 57 L. Ed. 1427, 1437; 230 U. S. 139, 33 S. Ct. 1033, it was said:

> "Without the guaranty of 'due process' the right of private property cannot be said to exist, in the sense in which it is known to our laws. The principle, known to the common law before Magna Charta, was embodied in that Charter (2 Coke, Inst. 45, 50), and has been recognized since the Revolution as among the safest foundations of our institutions. *Whatever else may be uncertain about the definition of the term 'due process of law,' all authorities agree that it inhibits the taking of*

one man's property and giving it to another, contrary to settled usages and modes of procedure, and without notice or an opportunity for a hearing." (Italics ours.)

That the taking by the Supreme Court of Arkansas constitutes a violation of the due process clause may be seen from *Chicago, Burlington & Quincy Railroad Co.* v. *City of Chicago,* 41 L. Ed., 979; 166 U. S. 226; 17 S. Ct. 581, where it was held:

"The prohibition of the 14th Amendment of the Federal Constitution against taking property without due process of law refers to all instrumentalities of a state, and is therefore violated whenever any person, by virtue of public position under a state government, *deprives another of any right protected by that Amendment against deprivation by the state.*" (Italics ours.)

In 16 C. J. S., Page 1276, it is stated (in the footnote):

"The seizure and sale of property not specifically described in authentic act of mortgage confessing judgment is void as taking of property without due process of law in violation of state and federal constitutions." (Citing Continental Securities Corp. *v.* Wetherbee, 175 So. 571, 187 La. 773).

We refer, of course to the NE¼ of SE¼ of Section 17, Township 16 South, Range 19 West; the N½ of S½ of N½ of NE¼ of NW¼ of Section 14, Township 17 South, Range 22 West; SE¼ of SW¼ of Section 12, Township 19 South, Range 23 West and E½ of Lot 35, Northeastern Addition to Magnolia, Arkansas. Not one of these four tracts of land was included in the notice of sale of real property appearing at R. 76 *et seq.*, although all of them appeared in the Sheriff's deeds; the first piece of property appearing in the Sheriff's deed at R. 69, the second piece of property appearing at R. 72, the third piece of property appearing at R.71, and the fourth piece of property

appearing at R. 62. That these tracts of property were not actually sold can hardly be disputed in the light of the testimony of the attorney for Mr. Wilson, appearing at R. 125, as well as the testimony of Sheriff S. J. McCollum at R. 131, that he tried to follow the notice of sale in selling the property.

We submit that when the Supreme Court of Arkansas ordered the lower court to quiet in respondents title to these four pieces of land, it took from petitioner his property without due process of law in violation of Amendment 14, Section 1 of the Constitution of the United States.

POINT B

Denial of Petitioner's Right to Equal Protection of the Laws in the Taking of His Property Without Due Process of Law by the Cutting Off of his Equity of Redemption, Guaranteed under the Laws of Arkansas Before He Had an Opportunity to Redeem.

This point was raised as Point 15 in petitioner's petition for rehearing in the Supreme Court of Arkansas.

In *Louisville Gas & Electric Co.* v. *Coleman,* 72 L. Ed., 770 (Headnote 2); 277 U. S. 32; 48 S. Ct. 423, the equal protection clause of the Constitution was defined as follows:

> "The equal protection clause of the Federal Constitution means that the rights of all persons must rest upon the same rule under similar circumstances, and applies to the exercise of all the powers of a state which can affect the individual or his property, including the power of taxation."

The pronouncement by this Court in *Pierre* v. *Louisiana,* 83 L. Ed. 757, 760; 306 U. S. 354; 59 S. Ct. 536, that:

> "• • • *for equal protection to all is the basic principle upon which justice under law rests.*" (Italics ours.)

is surely as applicable to the facts in the case at bar as it was in the case cited.

Let us consider for a moment what is the significance of the right to redeem here referred to, and whether or not that right to redeem has been denied petitioner. The lower court found (R. 138) that "The certificates of purchase, as well as the deeds of conveyance from the Sheriff to Alvin Rogers, covering the lands sold at the sale, were not filed in the Circuit Clerk's office until more than a year after the date of the sale". This finding of fact was not disputed or overturned by the Supreme Court of Arkansas, and it is, indeed, well borne out in the testimony.

Ed Keith, one of the attorneys for Mr. Wilson, the purchaser, testified that he made out the certificates of purchase (R. 126). Sheriff McCollum testified that Mr. Ed Keith wrote the certificates of purchase and Mr. Wilson paid him for writing them (R. 55).

These certificates of purchase were never out of the hands of Mr. Wilson and his attorneys. The original certificates of purchase were introduced by Mr. Wilson's attorneys, a copy of the same having been attached as Exhibits A, B, C and D to the "Amended and Substituted Answer" of the defendant. Thus, we see that J. B. Wilson, the purchaser at the sale, had his own attorney prepare the certificates of purchase, and that the same were never filed; and Wilson thereby effectively prevented the redemption by Kitchens of his lands by keeping from the record the information necessary for the Clerk to allow redemption.

Let us now see what the Arkansas Statutes provide in this connection. Pope's Digest Section 5340 (Arkansas Statutes—Section 30-439) provides in part:

> "• • • Such certificate (of purchase) shall be evidence of the purchase at the price stated, *and the officer shall return a duplicate thereof with the execution.*" (Italics ours.)

Respondents in the State Supreme Court attempted to construe this as being intended to give evidence only to the judgment debtor, of the purchase and at what price, and that Kitchens had this information, or had the opportunity of acquiring it. As a matter of fact, however, the evidence is necessary, not for the benefit of the judgment debtor, (for it is presumed that he or his agents will always be at the sale) *but for the benefit of the Clerk* who must be prepared to allow the judgment debtor to redeem as equired by law, and who would not normally be present at the sale.

Section 5342, Pope's Digest, (Ark. Statutes 1947—Section 30-441) states:

> "The debtor may, at any time within twelve (12) months, pay to *the Clerk of the Court* where the execution issued, the purchase money with fifteen (15) per cent, per annum, *and all lawful charges*, and take his receipt therefor; such money shall be held *by the Clerk* for the use of the purchaser, and *he shall be responsible upon his official bond therefor.* Such Clerk shall indorse upon the execution-book *that such redemption has been made.*" (Italics ours.)

This statute provides for a grave responsibility and positive action on the part of the Clerk, and it is essential that the clerk have official knowledge that the sale was made for a given price to a given person. *In the case at bar, the Clerk had no official knowledge that any sale had been made and no official knowledge of the identity of purchaser, or the amount of the purchase price.* Under such circumstances, it is obvious that he could not have performed the duties required of him under the above quoted statute; and, inasmuch as he was responsible on his official bond for performance, he would not have taken any money offered by Wade Kitchens for redemption, for had he done so and failed to use it as set out above, he would have been grossly endangering his bondsman, himself, and, indeed, his entire po-

litical future. *It would have been impossible for him to note that a redemption had been made, since he would not know officially whether the money given him by Kitchens constituted the purchase money, plus fifteen per cent, and he would not have known that a redemption had actually been made.* Further, the "lawful" charges which Kitchens must pay, would not have been known, either by the Clerk *or by Kitchens.*

Under such circumstances the action of the Supreme Court of Arkansas in declaring that Kitchens' right to redeem expired at the end of one year, even though it was impossible for him to redeem because of the purchaser's action in preventing the filing of the certificates of purchase as required by law, constituted a holding that a period of redemption never existed, and that, in spite of the guarantee of the Arkansas laws to *other* individuals of a right to redeem *their* property sold at execution, *this man could not have such a right.*

Neither laches nor limitations can be charged against Kitchens so long as the Clerk of the Court did not have before him sufficient information to allow Kitchens to redeem. The evidence, as required by Pope's Digest, Section 5340 (*supra*) Ark. Statutes 1947, Section 30-439 was not available to the Clerk and this was through no fault of Kitchens. Kitchens cannot be charged with failure to redeem *when it is clearly apparent that it was impossible for him to do so.* He was diligent, for the record shows that he and his agents watched the Clerk's Office for the entire year and, indeed, up until the time of the filing of this suit, awaiting the opportunity to redeem. Kitchens recognized that even if *he* knew the total purchase price and the purchaser, the Clerk could not officially know the amount necessary for Kitchens' redemption *until the certificates of purchase were filed and the return made on the execution.* No return on the execution was ever made.

Kitchens realized that the Clerk could not safely take his (Kitchens') word for the amount necessary to redeem, nor could the Clerk have taken the word of any other person—*nothing but the official evidence provided by the filing of the certificates of purchase could suffice.* (Of course, as a matter of fact, Kitchens himself did not know or have any way of knowing, the amount necessary to redeem his property, for he had no way of knowing what would be the Sheriff's charge for making the sale, and what other charges in connection with the execution, were to be assessed against him. It must be remembered that these charges must also be paid before redemption can be made.)

We wish to emphasize again that we do not contend that failure to file copies of the certificates of purchase and make return on the Writ of Execution, would, in any way affect *the validity of the sale, but it certainly would toll the running of the statutory period for redemption,* especially where the *purchaser* had *his own attorney* prepare the certificates.

POINT C

The Taking of Petitioner's Property by the Supreme Court of Arkansas and Ordering Title Thereto Vested in Respondents Takes Petitioner's Property Without Due Process of Law Because There Was No Judgment in Effect at the Time of the Purported Execution Sale and Therefore, the Execution Sale Did Not Constitute Due Process.

This point was raised as Point 2 in Petitioner's Petition for rehearing in the Supreme Court of Arkansas.

It is not disputed that Wilson, shortly before the sale, settled and satisfied, by compromise, the Warnock judgment out of which this Execution Sale grew. The written agreement of compromise and settlement was introduced and may be found at R. 41 *et seq.* The Supreme Court of Arkansas

itself (R. 156) made a finding as to the agreement. Wilson in a pleading in another case alleged that he had paid off the judgment (R. 99).

It is elementary that satisfaction of a judgment by one of several joint judgment debtors will serve to satisfy the judgment as to all. The Supreme Court of Arkansas in *Hazel* v. *Sharum*, 182 Ark. 557, 32 S. W. (2d), 315, so held, and this ruling was not overturned in the case at bar.

Under authority of the *Hazel* case (*supra*), when Wilson satisfied the Warnock judgment, the judgment itself expired and the execution sale was, therefore, had without any judgment in existence upon which to predicate the sale.

Nor can it be said, in argument of this point, that money was borrowed on the judgment and, therefore, it must still be kept alive, for when we admit this, we reach the inescapable conclusion that the money borrowed, upon the giving of security, constituted a lien against both Wilson and Kitchens *and would be as much the money of Kitchens as it was of Wilson*, and would, therefore, belong to Kitchens as much as to Wilson.

Let us now examine the law regarding the validity of execution sales held after satisfaction of the judgment upon which the execution was predicated.

In 21 Am. Jr., 250, 251, Sections 504, 505, it is stated:

> "Executions under Satisfied Judgments: A writ of execution may not be issued upon a judgment which has been previously satisfied. It is also improper to execute a writ of execution after satisfaction of the judgment. If the judgment is unsatisfied at the time of the issuance of the writ, but is satisfied before any sale is made thereunder, *the power to make the execution sales is thereby destroyed.* These rules prevail whether the satisfaction is made directly by payment or indirectly by other means. * * *
>
> "* * * It has also been held that a sale under a judgment which has been satisfied conveys no title, even

though the judgment was not satisfied of record, at least where the purchaser has notice of the payment of the debt."

And in 33 C. J. S., page 144, Section 11c, it is said:

"When, on any state of facts, the judgment becomes in legal contemplation in effect satisfied, no execution can lawfully issue thereon. Satisfaction of a judgment is also a satisfaction of an execution issued thereon."

Again, at page 568 of this same volume, it is said:

"Effect of Satisfaction of Judgment:

"It is commonly held that the satisfaction of a judgment prior to the execution sale renders the sale void, and that the purchaser takes no title although acting in good faith and without notice.

"While in some jurisdictions, especially in the earlier decisions, the rule is laid down that a bona fide purchaser without notice will acquire a good title, even though the execution is paid off or the judgment satisfied before sale, where the satisfaction does not appear of record at the time of or before the sale, the doctrine of the more numerous and more recent decisions is that the satisfaction of the judgment prior to an execution sale will render such sale void, and the purchaser will take no title thereunder, even though he bought in good faith and without notice. *In any event, no title passes if the purchaser had actual or constructive notice.*" (Italics ours.)

"A sale under a void judgment will be set aside, as will also a sale under a judgment which has been satisfied." (33 C. J. S. p. 448)

It cannot be denied that this is the general rule throughout all jurisdictions in the United States, nor can it be denied that the rule is applicable to this case. Many times the rule has been applied to cases where persons other than the judgment debtor paid off the judgment. For example, in *McIlvane* v. *T. J. M. Contracting Co.*, (N. J.

1929) 147 A. 333, the court was confronted with the situation where a judgment against a defendant was fully paid and satisfied by an indemnity company which sought to assign the judgment in order to keep it alive as to a co-defendant not covered by insurance. The Court held that an execution, under such judgment, was void because the judgment was satisfied. The court in so ruling, stated:

> "* * * The judgment against the contracting company having been fully paid and satisfied, there was no legal basis for the issuance of an execution against the property of the contracting company, and therefore the execution will be vacated and set aside."

In *Miller* v. *Andrews,* (Okla. 1935), 43 P. (2d) 415, a surety paid off a judgment and sought, by docket entries, to keep alive the judgment as against the judgment debtors. In that state, the sureties could have had subrogation by following a statute as to the filing of notice of claim to subrogation on contribution. The surety, however, did not follow this statute and the Court held that an execution issued on the judgment, was void because the Judgment has been paid. See also *Mayor and Council of City of Millen* v. *Clark,* (Ga. 1941), 17 S. E. (2d) 742.

In *Hart* v. *Harrell,* (Texas 1929), 17 S. W. (2d), 1093, 1094, one Phillips obtained judgment against Burkett and others. It seems that the judgment was principally against Burkett and secondarily against his co-defendants. Burkett paid off the judgment and had it assigned by the judgment creditor to one Morris, who was acting as the agent of Burkett. Execution was then had on the judgment. The co-defendants brought suit against Burkett and Morris. The Court, in determining that the payment of the judgment by the agent of one of the defendants constituted satisfaction and extinguished the judgment, states:

> "We have, however carefully considered the entire statement of facts and have reached the conclusion

> that, if the question of no evidence of payment, or insufficiency of evidence to show payment were before us, for determination, we would have to sustain the judgment. It will serve no useful purpose to detail the various bits of evidence considered in connection with the circumstances that altogether, we think, justified the jury in concluding that Burkett used Morris as his agent to pay the judgment. *That such will constitute payment as against a claim of right to enforce further execution of the judgment seems to be well supported by authorities cited by appellees.*" (Italics ours).

That case is directly in point with the case at bar, for here, as in that case, one judgment debtor entered into an agreement with the judgment creditor whereby the judgment creditor would be paid off and the judgment assigned to his (Wilson's) agent, Shep Beene. As in the *Hart* case (*supra*), this constituted satisfaction of the judgment and the execution sale had after satisfaction of the judgment must be held to have been void because of such payment. See also *Shelton* v. *Cady,* (Mo. 1923), 250 S. W. 403.

In *Huggins* v. *Johnston* (Texas 1931), 35 S. W. (2d) 688, 690, a joint and several judgment was had against guarantors on a note which they had executed jointly in guaranty of a line of credit, the principal having become bankrupt. One of the guarantors paid off the joint and several judgment and had the judgment assigned to himself and he then sought to have the judgment fixed as a lien upon his co-guarantors' property. The Court, in holding that the payment of the judgment constituted satisfaction, stated:

> "In the instant case, the judgment was taken against the makers of the note who were the two sureties on the original bond. In Ft. Worth Nat. Bank *v.* Daugherty one party was compelled to pay the judgment to prevent the sale of his property and took a transfer

thereof; the same is true in the instant case. In Ft. Worth Nat. Bank *v.* Daugherty, the party paying, and who at the time took a transfer to himself, attempted to enforce the judgment by execution against his co-surety or co-defendant; the same is true in this case. In Ft. Worth Nat. Bank *v.* Daugherty our Supreme Court held that the facts showed as a matter of law the satisfaction and extinguishment of the judgment as such. The same conclusion, therefore, must be reached in this case. *It follows, of course, that, if the judgment was extinguished in the instant case, and could not be enforced by execution, any effort to fix a judgment lien on the land of Johnston by recording an abstract of such judgment would fail of its purpose and be wrongful.*" (Italics ours).

In the same case, it is stated that E. T. Morris, T. H. Wilson and T. B. Jones, all signed as sureties the note of one E. L. Morris.

> "E. L. Morris died, and was not sued. It appears that the bank recovered a judgment against the three parties first named. It is also shown that E. T. Morris was insolvent. An execution was issued on this judgment, and the owner, the bank, receipted and made a transfer thereof to T. B. Jones. T. B. Jones then attempted by pluries execution to enforce the judgment against T. H. Wilson. * * *
>
> "*It is then held that the judgment, having been paid by T. B. Jones, was discharged, and there was no authority for the subsequent issuance of an execution upon it as upon an unsatisfied judgment at the request of T. B. Jones or for his benefit.*" (Italics ours).

Of course, in each of the above cases, the person paying off the judgment had the right to demand contribution from his co-obligor, and Wilson, in the case at bar, had the same right. His right to demand contribution was not barred at the time of the bringing of this suit in 1938, and, indeed,

Kitchens has not sought to escape his obligation to contribute to the satisfaction by Wilson of the Warnock judgment. Contribution from his co-obligor was the only remedy, either legal or equitable, which Wilson had under the circumstances, and to hold that his satisfaction of the judgment did not satisfy the execution is contrary to law, equity, and good conscience, and constitutes the taking of Kitchens' property without due process of law.

An Execution Sale had after the satisfaction of a judgment cannot constitute due process, *for it takes the property of the former debtor without cause and for no reason.* The purchaser in this case was fully aware that the judgment had been satisfied, for the true purchaser, if it can be said that there was a sale, was none other than Wilson himself, the person who had paid off the joint debt.

POINT D

The Arkansas Statute under Which the Execution Sale Was Had Is Void in the Light of the Supreme Court's Determination That It Does Not Provide for Levy and Notice of Sale as Necessary Prerequisites to Validity of the Sale.

This point was raised in part under Points 1 and 14 of petitioner's Petition for Rehearing in the Supreme Court of Arkansas.

Although the Statute appears on its face to provide for levy and notice the Supreme Court of Arkansas has determined that it does not provide for these essential elements *as prerequisites to a valid sale.*

In *Louisville Gas & Electric Co.* v. *Coleman,* 72 L. Ed., 770; 277 U. S. 32; 48 S. Ct. 423, it was held:

> "The Supreme Court of the United States will, in reviewing a decision of a state court upholding the validity of a state statute under the state Constitu-

tion, accept as conclusive *the construction of the statute by the state court.*" (Italics ours).

By the same doctrine this court must conclude from the determination of the Supreme Court of Arkansas that the statute does not provide for proper notice and levy *as a prerequisite to a valid Execution Sale.*

> "A statute fair upon its face may be shown to be void and unenforceable on account of its actual operation" (Great Northern Railway Co. *v.* Washington 81 L. Ed., 573, Headnote 7; 300 U. S. 154; 57 S. Ct. 397).

That this point was raised in time must be conceded when it is remembered that previous constructions of the statute had always recognized levy and notice as *essential* to the validity of a sale. In *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* 74 L. Ed., 1107, 281 U. S. 673; 50 S. Ct. 451, it was held:

> "A Federal question raised for the first time on petition for rehearing in the highest court of the state is raised in time, where it is presented by a construction placed upon a statute by such court in its decision, *at variance with a construction formerly adopted by it.*" (Italics ours).

And again in *Missouri* v. *Gehner,* 74 L. Ed., 870; 281 U. S. 313; 50 S. Ct. 326, it was held:

> "Although the Supreme Court of the United States ordinarily will not consider contentions first made in a petition to the state court for rehearing, where the petition is denied without more, the question whether a state tax law is violative of Federal constitutional and statutory provisions precluding state taxation of Federal securities is properly presented in the state court, so as to be entitled to consideration by the Supreme Court of the United States, although it is first raised in a petition for rehearing after a decision of the state court so construing the statute

as to give it that effect, *where such construction was not reasonably to be anticipated.*" (Italics ours).

In *Near* v. *Minnesota,* 75 L. Ed., 1357, 1358; 283 U. S. 697; 51 S. Ct. 625, it was held:

"In passing on the constitutionality of a state statute the Supreme Court has regard to substance, and not to mere matters of form, *and the statute must be tested by its operation and effect.*" (Italics ours.)

In the Arkansas case of *Brown* v. *Vaughan,* 184 Ark. 364; 42 S W (2d) 558, (Headnote 4), it was held:

"Sale of personal property in bulk was void where part of it was not legally levied upon."

Due process of law requires that proper notice be given and that a person's property be not taken from him except upon notice properly given, an opportunity to be heard, and the following of a prescribed procedure, calculated to do justice to all concerned as to the property sold.

In *Wuchter* v. *Pizzutti* 72 L. Ed., 446; 276 U. S. 13; 48 S. Ct. 259, it was held:

"A law designating a state official as the proper person to receive service of process in an action against a nonresident for injury by the use of a motor vehicle on the highways *must, to be valid,* contain a provision making it reasonably probable that *the notice* will be communicated to the person sued." (Italics ours.)

It is inconceivable that a statute providing for an Execution Sale without making provisions for levy or notice of sale as prerequisite to a valid sale would be held to be constitutional, yet, under the determination of the Supreme Court of Arkansas in the case at bar, this is the type of statute that is now in effect in Arkansas, for while the Supreme Court of Arkansas admits that the statute provides for notice and levy, *it holds that a failure to give notice*

and to levy upon the property to be sold are mere irregularities and do not render the sale void but merely voidable upon direct attack within one year from the date of sale.

This type case must be distinguished from the case of a judicial sale, the defects of which are cured by confirmation, for the confirmation proceeding *itself provides for notice to the debtor and an opportunity for him to be heard on claim of fatal irregularities prior to the confirmation.* Where there was no confirmation proceeding, and no opportunity for petitioner to be heard, to take from him his property without such notice cannot be due process.

POINT E

To Take Petitioner's Property Because of a Purported Execution Sale at Which the Purchaser Paid Nothing and Got Nothing and at Which the Debtor Received No Benefit Constitutes the Taking of Petitioner's Property Without Due Process of Law.

This point was raised in Point 20 in Petitioner's petition for rehearing in the Supreme Court of Arkansas.

In consideration of this point, let us consider the testimony with regard to the so-called "Execution Sale". It will be remembered that the property of Kitchens was "sold" to Alvin Rogers, the dummy bidder of Wilson for the sum of $4750.00. The sheriff testified that he received no money from anyone (R. 110). Alvin Rogers testified that he paid no money and had no personal interest in the sale (R. 105). R. S. Warnock (R. 50) and C. W. McKay (R. 96) both testified that an assignment was made to Shep Beene of the entire judgment.

Under these circumstances it is obvious that at this so-called "Execution Sale" Alvin Rogers paid no money. Wade Kitchens, the debtor, received no credit on his in-

debtedness, yet his property was transferred to Alvin Rogers. Under such circumstances it is obvious that no true sale was had and that the Sheriff's deeds were, in fact, void for want of consideration. When the Supreme Court of Arkansas ordered the trial court to take from petitioner, Wade Kitchens, his property and vest title to this property in respondents because of this alleged Execution Sale and the Sheriff's deeds executed in connection therewith, it obviously took from petitioner his property without due process of law.

In 33 C. J. S. 576, Section 289, it is said:

> "In any event, the highest bidder acquires no title to the thing purchased until payment of the purchase price;" * * *

In *Smith* v. *Cook* (Texas 1939), 126 S. W. (2d), 1049, 1051, the Court stated:

> "It is uniformly held in this state that under a sale of real estate under execution, the bidder acquires no title to the property purchased before and until the payment of the purchase price bid. The bid and payment of the purchase price constitute the purchaser's right and the sheriff's deed is only evidence of that right."

POINT F

The Circumstances Surrounding This Sale Were So Irregular and Unusual That They Could Not Be Called Due Process of Law, and the Taking of Petitioner's Property by the Supreme Court of the State of Arkansas in Ordering Title to the Same Vested in Respondents Because of Said Sale Constituted the Taking of His Property Without Due Process of Law.

This point was raised in Point 3 of Petitioner's Petition for Rehearing in the Supreme Court of Arkansas.

It will be admitted, we believe, that if petitioner's property was taken by a state official or agency without a valid sale, such taking would be unconstitutional as the taking of his property without due process of law in violation of Amendment 14, Section 1 of the Constitution of the United States.

In Washington ex rel. *Oregon R. & N. Co.* v. *Fairchild,* 56 L. Ed., 863, 868; 224 U. S. 510; 32 S. Ct. 535, the court stated:

> "For the guaranty of the Constitution extends to the protection of fundamental rights,—to the substance of the order as well as to the notice and hearing which precede it. *'The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation'.* Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 236, 41 L. Ed. 984, 17 Sup. Ct. Rep. 581; Missouri P. R. Co. *v.* Nebraska, 164 U. S. 416, 41 L. Ed. 494, 17 Sup. Ct. Rep. 130. So that, where the taking is under an administrative regulation, the defendant must not be denied the right to show that, as matter of law, *the order was so arbitrary, unjust, or unreasonable as to amount to a deprivation of property in violation of the 14th Amendment.* Chicago, M. & St. P. R. Co. *v.* Minnesota, 134 U. S. 418, 33 L. Ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Smyth *v.* Ames, 169 U. S. 466, 42 L. Ed. 819, 18 Sup. Ct. Rep. 418; Chicago, M. & St. P. R. Co. *v.* Tompkins, 176 U. S. 173, 44 L. Ed. 420, 20 Sup. Ct Rep. 336." (Italics ours.)

Let us consider the facts in this sale:

On the day of sale Wilson concluded his agreement with Warnock whereby he (Wilson) was to take charge of the sale (R. 41). Although Wilson's property was advertised for sale and was to be sold along with Kitchens', it was then agreed that Wilson's property would not be put up for sale,

but that only the property of Kitchens would be sold (R. 42). Wilson (R. 125) then arranged the lands in four large blocks (R. 53), each block to be sold as a separate entity.

One of these blocks contained approximately 3500 acres of land widely scattered over Columbia County (R. 23). Another block contained city property in several different cities (R. 30). Some of the blocks contained land not belonging to Kitchens, or to Wilson either, but to strangers.

Much of the land had not been levied upon and some of it had not been included in the notice of sale (See Point A). Wilson obtained postponement of the sale until shortly before 3 o'clock and three of the four blocks of property sold were sold after 3 o'clock (R. 53), although the advertisement of sale (R. 76) announced that it would be held between the hours of 9 o'clock in the forenoon and 3 o'clock in the afternoon (the time prescribed by law).

Wilson then purchased the property through his "dummy" bidder, Alvin Rogers (R. 101 et seq.), for the sum total of $4750.00, although the property itself, even in those times, was worth more than $60,000.00 (R. 119). The way the propery was arranged for sale, prospective bidders could not possibly have been able to bid on the property with any degree of accuracy.

Many of the bidders had left because they had heard that this sale, like the first Execution Sale, was not to be had (R. 49). Wilson, by this means, purchased over 4000 acres of lands plus varying interests in other lands plus brick store buildings and homes and other city property for the total sum of $4750.00. Wilson had his own attorney call off the descriptions of the property (R. 125) and, after the sale, had his attorney (who is an attorney of record for respondents in connection with this petition for certiorari) undertake to prepare the certificates of purchase and sher-

iff's deeds (R. 55), and the said attorney did not file copies of the certificates of purchase, nor have anyone else file copies of the certificates of purchase, as required by law, until after the expiration of the one year redemption period (R. 84 and 85). The Sheriff, who was supposed to have been making the sale, readily admitted in his testimony (R. 132) that he had very little to do with the sale.

Under such circumstances we submit that *the mere form of an execution sale was all that was followed in this case and that mere form of an Execution Sale could not possibly be sufficient to constitute the due process of law required by the Federal Constitution.* The sale was run by and for the benefit of one man, J. B. Wilson, who, himself purchased the property.

In a case much less aggravated than this, the Supreme Court of the United States in *Shroeder* v. *Young,* 40 L. Ed. 721, 724, et seq., 161 U. S. 334, 16 S. Ct. 512, denounced an execution sale and declared it void, not merely voidable. In that case, the Supreme Court said:

> "While mere inadequacy of price has rarely been held sufficient in itself to justify setting aside a judicial sale of property, *courts are not slow to seize upon other circumstances impeaching the fairness of the transaction,* as cause for vacating it, especially if the inadequacy be so gross as to shock the conscience. If the sale has been attended by any irregularity, as *if several lots have been sold in bulk where they should have been sold separately,* or sold in such a manner that their full value could not be realized; *if bidders have been kept away;* if any undue advantage has been taken to the prejudice of the owner of the property, or he has been lulled into a false security; or, if the sale has been collusively, or in any other manner, *conducted for the benefit of the purchaser,* and the property has been sold at a greatly inadequate price,—the

sale may be set aside, and the owner may be permitted to redeem. * * *

"There is one finding, however, in respect to these sales, which, taken in connection with the facts that the defendants were the attorneys for the judgment creditors, furnished the officer selling the property with the description of the property to be levied upon and sold, and became the purchasers of the property either directly from the marshal, or indirectly through their client Clark, which is in itself sufficient to justify the action of the court below in vacating the sales and permitting the plaintiff to redeem. * * *

"Probably, if a motion had been made in the original case to set aside the sale upon the ground of mere irregularities, such motion would have to be made before the statutory period for redemption had passed; *but in this class of cases, where fraudulent conduct is imputed to the parties conducting the sale,* there is a concurrent jurisdiction of a court of equity, founded upon its general right to relieve from the consequences of fraud, accident, or mistake, which may be exercised *notwithstanding the statutory period for redemption has expired.* It is evident that, where a sale has culminated in the execution and delivery of a deed to the purchaser, which is not void upon its face, or a mortgage has been put upon the property, as in this case, no remedy is complete which does not go to the cancellation of such deed, and the complete reinvestment of the title in the plaintiff. It also appears from the findings that appellant has received rents from the property, that various sums had been expended for taxes and other purposes, that an accounting was necessary in adjusting the rights of the parties, which could not be effectually carried on in a court of law. *There can be no doubt of the jurisdiction of a court of equity in such case notwithstanding the expiration of the statutory time of redemption. Graffam* v. *Burgess,* 117 U. S. 180; *Blight* v. *Tobin,* 7 T. B. Mon. 612, 18 Am. Dec. 219; *Day* v. *Graham,* 6 Ill. 435; *Morris* v. *Robey,* 73 Ill. 462;

Fergus v. *Woodworth,* 44 Ill. 374; *Bullen* v. *Dawson,* 131 Ill. 633; *Jenkins* v. *Merriweather,* 109 Ill. 647; *State Bank* v. *Noland,* 13 Ark. 299." (Italics ours.)

In Iowa-Des Moines National Bank *v.* Bennett 76 L. Ed. 265, 266 (Headnote 3); 284 U. S. 239; 52 S. Ct. 133, it was held:

> "Although the prohibition of the 14th Amendment has reference exclusively to action by the state as distinguished from action by private individuals, the rights thereby protected may be invaded by the acts of a state officer under color of state authority, *even though he not only exceeded his authority, but also disregarded special commands of the state law.*" (Italics ours.)

That the taking by the Sheriff's deeds constituted a violation of the due process clause under this decision is obvious. It might then be asked "Why was not the constitutional issue raised in the lower court on the basis that the sheriff had taken the petitioner's property without due process of law?" The answer to this is that *all of the prior decisions of the Supreme Court of Arkansas were to the effect that such action on the part of the sheriff would not constitute actual taking, but would instead merely constitute a cloud upon petitioner's title.*

Assuming that this was the law, as it had been pronounced by the Supreme Court of Arkansas, petitioner asked, not that his property be returned to him, but instead *that the sheriff's deeds be cancelled as clouds on his title.*

The lower court held that the sheriff's deeds were mere clouds upon petitioner's title and cancelled them. *If they were mere clouds upon his title they could not possibly constitute a taking of his property, for a cloud upon title does not actually take the property but merely beclouds the title still resting in the petitioner.*

To our amazement, however, the Supreme Court of Arkansas reversed the trial court and declared, as the new rule of law in Arkansas, that such action by the sheriff constituted a valid taking unless attacked directly within one year.

Under such circumstances, we submit that the taking of petitioner's property without due process of law, was by the Supreme Court of Arkansas and not by the sheriff; or, in the alternative that petitioner raised the issue as soon as could be reasonably expected, under the rule announced in *State of Missouri* v. *Gehner* (*supra*), for this conclusion by the Supreme Court of Arkansas, in the light of its previous pronouncements, could not have been reasonably anticipated.

Conclusion

It is, therefore, respectfully submitted that this case is one calling for the exercise of this court's supervisory power, in order that the decision and judgment of the Supreme Court of Arkansas may be corrected, and that to such end a writ of certiorari should be issued and this court should review the decision of the Supreme Court of Arkansas and finally reverse it.

Respectfully submitted,

WADE KITCHENS
By W. H. KITCHENS, JR.
WILSON, KIMPEL AND NOBLES,
U. A. GENTRY
Attorneys for Petitioner
By J. R. WILSON.